

GAO

Report to the Chairman, Subcommittee  
on International Law, Immigration, and  
Refugees, Committee on Judiciary,  
House of Representatives

June 1992

# IMMIGRATION CONTROL

## Immigration Policies Affect INS Detention Efforts



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June 25, 1992

The Honorable Romano L. Mazzoli, Chairman  
Subcommittee on International Law,  
Immigration, and Refugees  
Committee on the Judiciary  
House of Representatives

Dear Mr. Chairman:

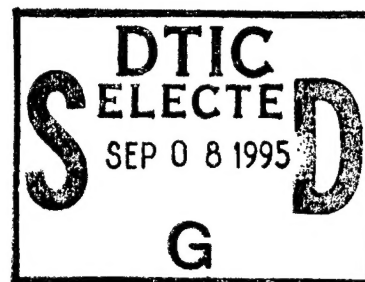
This report responds to the Subcommittee's request that we examine the Immigration and Naturalization Service's detention policy and practices.

As arranged with the Subcommittee, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days after the report date. At that time, we will send copies of this report to the Attorney General, Department of Justice; the Commissioner, Immigration and Naturalization Service; and other interested parties. Copies will also be made available to others upon request.

Major contributors to this report are listed in appendix III. Please call me on (202) 566-0026 if you have any questions.

Sincerely yours,

Harold A. Valentine  
Associate Director, Administration  
of Justice Issues



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*Immigration Control:  
Immigration Policies Affect  
INS Detention Efforts*

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# Executive Summary

## Purpose

Immigration advocacy groups have questioned detention practices affecting illegal immigrants, implying that they violate civil and human rights and are arbitrary, capricious, and even discriminatory. For example, the decision to detain illegal immigrants from Haiti beginning in 1981 and continuing with the incarceration of certain Central Americans in 1989 has caused controversy.

The House Judiciary Subcommittee on International Law, Immigration, and Refugees, which expressed concern about these issues, asked GAO to review the Immigration and Naturalization Service's (INS) detention policies and practices. Specifically, GAO analyzed the implementation of INS criteria and priorities governing alien detention and length of detention to determine the basis on which INS detains aliens.

## Background

When Congress passed the Immigration and Nationality Act of 1952, the illegal flow of aliens into this country was not a major problem. Since then, however, the flow has become a torrent. Apprehensions of aliens illegally entering the country have risen from 45,000 in 1959 to 1.17 million in 1990.

INS apprehends aliens it wants to deport or exclude from the country. For the purposes of this report, excludable aliens are those persons to whom INS denies admission to the country. Deportable aliens are those persons who violate their condition of entry or enter illegally and are subject to deportation. Criminal aliens are those persons who were convicted of a crime (e.g., murder) for which they can be deported.

Aliens in all three groups, deportable, excludable, and criminal, are entitled to a hearing before an immigration judge to determine whether they should be deported or excluded. Pending the resolution of their cases, INS can detain the aliens, release them on bond, or release them on their own recognizance. To handle detainees, INS' detention capacity nationwide is 6,259 beds. In 1990, those detained by INS were held an average of 23 days. (See p. 12 and p. 16.)

In February 1991, INS established a flexible national detention policy and priority system. The system contains criteria to be used throughout INS in deciding which aliens to detain. Under the system, the highest priority is the detention of criminal aliens, followed by exclusion cases. The system permits INS field offices discretion in making their custody determinations. (See p. 14.)



INS operates two programs that can result in somewhat reducing the demand on its detention capabilities.

- Under the institutional hearing program, criminal aliens are to have their deportation hearing while they are serving their sentences in state and federal facilities. If their hearings are not completed before the end of their sentences, INS detains them until the hearing process has been completed. (See p. 13.)
- Under the preflight inspection program, INS determines if the aliens should be permitted to enter the country before they depart from a foreign airport. As a result, excludable aliens are not permitted to land at domestic airports and do not have to be detained until INS can expel them. (See p. 40.)

While not explicitly a part of this INS priority system, laws and administrative policy also affect INS detention decisions regarding certain nationalities. For example, the Cuban Adjustment Act of 1966 recognized Cuban nationals as political refugees. In response to this act, INS does not detain Cubans for extended periods of time. (See p. 30.)

To make its analysis of INS detention policies and practices, GAO reviewed available records of all aliens (2,705) who were detained at the time of its visits at 13 detention facilities. (See p. 19.)

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## Results in Brief

INS is faced with a complex problem of coping with the hundreds of thousands of aliens it apprehends. According to estimates, about 489,000 aliens were subject to detention for such reasons as awaiting deportation or being criminals between 1988 and 1990. INS' planned expansion from 6,259 to 8,600 beds by 1996 will not significantly alleviate the shortage of detention space.

Detaining all such aliens in current available facilities is impractical and cost prohibitive. On the other hand, detaining some but not all aliens may mean that aliens in similar circumstances are treated differently.

Given the average 23 days of detention per alien in 1990, INS can detain about 99,000 aliens a year at its current facilities. However, according to INS data, about 489,000 aliens were subject to detention between 1988 and 1990 because they were criminal, deportable, or excludable. INS has released criminal aliens and not pursued illegal aliens because it did not have the detention space to hold them.



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INS has made a good faith effort to implement its national priority system for determining which aliens to detain. However, GAO found that INS does not treat excludable aliens consistently—some were released within a few days, while others remained in detention for extended time periods. Whether INS detained an alien and for how long depended on the amount of available space where the alien was eventually detained, the location of the alien's apprehension, and laws and administration practices directed at certain nationalities.

In GAO's view, INS' need for increased detention space is symptomatic of larger enforcement issues relating to aliens that remain unresolved—how best to gain better control over the flood of aliens entering the country illegally and how to improve on efforts to remove aliens already in the country who do not have a legal basis to remain. Effective resolution of these issues will require Congress and the administration to decide whether and how to best control our borders and remove aliens who are illegally here. Until these issues are more fully resolved, it is unrealistic to expect INS to overcome its shortage of detention space.

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## Principal Findings

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### INS Does Not Have Sufficient Detention Capability

The increasing number of aliens who meet the criteria for removal from the country has placed a high demand on INS detention resources. INS projects that 88,800 criminal aliens will need to be detained in 1996. Large numbers of excludable and deportable aliens—as many as 400,000 according to INS estimates—will also be subject to detention. Meeting the need to detain the half million excludable, deportable, and criminal aliens annually who meet its detention criteria would impose enormous costs on INS—costs that are unlikely to be funded under current budget restrictions. (See p. 38 and p. 42.)

Limited detention space has led INS to release aliens in accordance with its priority criteria. For example, INS released 382 convicted criminal aliens on their own recognizance between October and December 1990 who had been detained in facilities in its Western Region. (See p. 41.)

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### Programs to Mitigate Detention Have Minimal Effect

The institutional hearing and preflight inspection programs can mitigate the demand for detention space.

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- In 1990, INS reported that the institutional hearing program, although in place and operational in many states, was not operating at its full potential. In February 1991, INS reported that only about 6 percent of criminal aliens complete their deportation hearings before completing their sentences. (See p. 39.)
  - INS operates the preflight inspection program at foreign airports in four countries. In May 1991, INS' New York District Office reported that by expanding the program to six European airports, approximately 25 percent of the exclusion cases at John F. Kennedy International Airport would be eliminated. (See p. 40.)

However, given the overwhelming number of apprehended aliens who are subject to detention, greatly expanding these programs would have only a minimal effect on INS's detention needs.

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## Detention Differs Among Aliens

Of the aliens detained at the time of GAO's visit to 13 facilities, 915 were criminal aliens, 993 were deportable aliens, and 793 were excludable aliens. Their detention was generally consistent with INS' February 1991 detention policy and priority system for determining which criminal and excludable aliens to detain in available facilities. However, the results produced differences among nationalities and in the length of their detentions.

- INS detains Haitians who try to enter the country for extended periods of time. At INS' Krome detention facility, the average length of time those in GAO's sample had already spent in detention was 101 days, while Indians had been detained an average of 69 days. (See p. 27.)
- INS detains Chinese aliens as they try to enter the country in New York. Limited detention space in New York resulted in INS transferring some of the Chinese to its Denver facility. The time those in GAO's sample had spent in detention in New York was an average of 11 days compared to 86 days for those in Denver. The difference in detention time was related to the location of their detention rather than to their behavior or the factors surrounding their individual cases. (See p. 27.)
- Excludable aliens who were detained at the time of GAO's review had been detained an average of 56 days. Aliens who had illegally entered the country and were subsequently apprehended for noncriminal behavior had been detained an average of 47 days. (See p. 25.)

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## Matter for Congressional Consideration

Unless the programs designed to prevent aliens from illegally entering the country and to remove those who have no legal basis to remain here are made more effective, INS has little hope of detaining any more than a small fraction of the criminal and other aliens meeting its detention criteria. Inevitably, proposals to tighten the nation's borders and to expedite the expulsion of deportable aliens have to take into account their rights to constitutionally based protections and must deal with complex and sensitive issues, such as potential strains in relationships with Mexico and other nations, humanitarian concerns relating to equitable treatment of aliens, and difficult budgetary trade-offs. Nonetheless, until Congress comes to grips with these problems and trade-offs, little progress in resolving detention issues can be expected.

Congress may therefore wish to address border security and deportation issues in the course of future deliberations on immigration policy, specifically: How tight do we want our borders to be; how aggressively should we expel deportable aliens, and how much additional funding are we willing to invest in these efforts? (See pp. 43 to 44.)

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## Agency Comments

Justice generally agreed with GAO's findings and recommendations and provided technical comments, which GAO incorporated where appropriate. (See p. 58.)





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### Abbreviations

BIA	Board of Immigration Appeals
EOIR	Executive Office of Immigration Review
INS	Immigration and Naturalization Service
TPS	temporary protected status



# Introduction

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The Immigration and Nationality Act (8 U.S.C. 1101) authorizes the Attorney General to

- deport (expel) aliens who entered the country illegally, violated a condition of entry, or were convicted of certain crimes such as murder, manslaughter, or rape; and
- exclude (deny admission to) aliens who are not authorized to enter the United States.

The act further authorizes the Attorney General to detain aliens pending their deportation or exclusion hearings before an immigration judge. Pending the judge's determination of deportability, the Attorney General may continue to detain aliens without bond, release them on bond of not less than \$500, or release them on their own recognizance. Most aliens are released on bond or their own recognizance. Also, aliens who are excludable are entitled to hearings and pending their hearings may be detained or temporarily admitted (paroled) into the country.

Within the Department of Justice, the Immigration and Naturalization Service (INS) is responsible for enforcing the act. The authority of the Attorney General to detain aliens has been delegated to INS district directors. INS offers most aliens whom it determines to be excludable or deportable (other than criminals and subversives) the opportunity to leave the country voluntarily. Should aliens decide not to do so, they are entitled to a hearing before they can be deported or expelled.

In fiscal year 1990, INS apprehended at borders and within the country 1.17 million aliens, most of whom had entered the country illegally (deportable). Of this total, about 1.02 million left the country voluntarily. In addition to these apprehensions, 27,213 deportable aliens were expelled; 887,923 excludable aliens who were stopped at ports of entry withdrew from the country voluntarily; and 3,700 excludable aliens, who had not agreed to withdraw voluntarily, were denied entry.

Department of Justice records show that as of September 30, 1990, between 40,000 and 50,000 aliens were either awaiting deportation or exclusion hearings and that approximately 250,000 aliens may have illegally remained in the country after being ordered to leave.

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## Aliens Fall Into Several Categories

Aliens may be in the United States legally or illegally. Aliens may enter legally as either immigrants or nonimmigrants. Immigrants enter to

become lawful permanent residents. Generally, legal entry requires aliens to first obtain visas at a U.S. consulate and appropriate travel documents, such as passports, from their own government. They then present themselves for INS inspection at a U.S. port of entry. In fiscal year 1990, a total of 1,536,483 aliens were admitted as immigrants. Of this total, about 880,000 became permanent resident aliens.

Nonimmigrants are admitted for a specified period of time for a specific purpose, such as tourism, business, or schooling. In fiscal year 1990, 17.6 million nonimmigrants arrived. Under certain conditions, nonimmigrants in the United States may apply to INS to have their status changed to that of immigrant.

Illegal aliens are aliens who enter by evading INS inspection. They might cross a U.S. border between ports of entry or enter at a port of entry and present fraudulent entry documents. Illegal entry is a criminal violation with a penalty of up to 6 months' imprisonment and/or a \$500 fine upon conviction.

An alien is deemed excludable from entry if any 1 of 33 conditions set out in the act applies. If aliens are to be excluded from entry, INS needs to make the exclusion decision when the aliens present themselves for admission to the country at a port of entry. For example, aliens are excludable if INS can prove that they have a dangerous contagious disease; are narcotic addicts, convicted criminals, or members of subversive organizations; are seeking to enter to obtain unauthorized work; or lack valid visas, passports, or other required documents. INS has the authority to deny entry to those aliens who meet the exclusion conditions.

Aliens are deportable if after entering the country, either legally or illegally, they meet one of INS' 20 conditions for deportation. Under the act, aliens may be deported if, among other reasons, they

- were convicted of certain crimes (e.g., drug trafficking);
- were excludable at the time of their entry;
- entered illegally (i.e., without undergoing INS inspection);
- entered legally but violated the conditions of their entry, such as overstaying their required departure date or working without authorization;
- were smuggling other aliens into the country;
- are members of totalitarian or communist organizations or were associated with Nazi governments; or

- advocate or engage in subversive activities.

For the purposes of this report, the term “criminal aliens” includes all aliens, legally or illegally residing in the United States, who have been convicted of a crime for which they could be deported. In contrast, the term “deportable alien” includes all noncriminal aliens whose only crime is being here illegally (e.g., entered illegally or violated their condition of entry).

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## INS Enforcement

INS operates through a central office, 4 regional offices, 33 domestic district offices, 21 Border Patrol sectors, and 162 INS-staffed ports of entry.<sup>1</sup> INS’ budget, including user fees, was about \$1.1 billion for fiscal year 1991.<sup>2</sup> Within each district office, the structure consists of the following three major elements:

- The inspections group is responsible for facilitating the entry of qualified applicants to the country and identifies and denies admission to those who do not qualify for entry.<sup>3</sup>
- The detention and deportation group is responsible for detaining deportable and excludable aliens and for removing them from the United States.
- The investigations group is responsible for identifying, locating, and apprehending deportable aliens.

The Border Patrol is responsible for preventing the entry of aliens between ports of entry and apprehending aliens in border areas. In some areas, the Border Patrol also performs investigations to locate illegal aliens.

INS operates 9 detention facilities (i.e., service processing centers) capable of detaining 2,864 people. Through contracts, INS has the use of 5 facilities providing space for another 653 people. INS contracts with state and local prisons and jails to provide an additional 1,800 beds. It also uses a hospital with 110 beds and a Bureau of Prisons facility with 832 beds. Thus, INS has capacity to detain 6,259 aliens. INS’ detention expenditures increased from \$82 million to \$149 million between fiscal years 1986 and 1990.

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<sup>1</sup>Other ports of entry are not permanently staffed.

<sup>2</sup>INS is authorized to use the fees it collects to support its programs. For example, a \$5 fee is collected from international travelers arriving at U.S. airports and seaports; this is used for inspection and related activities.

<sup>3</sup>In addition, inspections approves or denies applications and petitions for benefits such as visitors’ requests to extend their stay in the country.



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## Executive Office for Immigration Review

Within Justice, but separate from INS, the Executive Office for Immigration Review (EOIR) consists primarily of (1) immigration judges who conduct hearings to consider aliens' applications for relief from exclusion and deportation and ultimately decide whether or not to exclude or deport them, and (2) the Board of Immigration Appeals (BIA).

Immigration judges hold hearings throughout the country. As of April 1, 1992, 88 immigration judges were located in 20 cities and EOIR headquarters. In fiscal year 1991, immigration judges completed about 128,400 cases that involved alien deportability or excludability.<sup>4</sup>

In addition to the field offices, immigration judges also hold deportation hearings at selected federal and state prisons under the institutional hearing program. Under the program, which began in 1987, immigration judges can hold deportation hearings for criminal aliens while they are still incarcerated. If found deportable (and if any appeals are unsuccessful), aliens are deported after being released. Aliens incarcerated in a state prison that is not used for deportation hearings are transported to one that is used for hearings and returned after the hearing to their original prison. Seven federal prisons are used for deportation hearings.

BIA hears appeals from decisions of immigration judges and INS. BIA is a quasi-judicial body composed of a chairman and four members appointed by the Attorney General. It is located in Falls Church, Virginia, where it renders decisions for the entire country.

BIA relies on the record of the previous proceeding before an immigration judge to make a decision, but it may also hear oral arguments. Its decisions are binding on all INS officers and immigration judges unless modified or overruled by the Attorney General. The decisions are also subject to judicial review in the federal courts.<sup>5</sup> In fiscal year 1991, BIA completed about 13,700 cases that involved deportation and exclusion.

For fiscal year 1991, the total EOIR budget was about \$38 million.

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## INS Detention Policy

In February 1991, INS established a flexible national detention policy and priority system to enforce the immigration and nationality laws of the

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<sup>4</sup>Other cases do not pertain directly to exclusion or deportation but involve issues such as aliens' requests to have bond amounts lowered.

<sup>5</sup>BIA decisions can be appealed through the federal district courts, the U.S. Court of Appeals, and—ultimately—the U.S. Supreme Court.

United States and to comply with recent statutory requirements relating to criminal aliens. The system sets forth INS detention policy, in priority order, for the following six major groupings:

- The first group includes aliens who are (1) convicted for aggravated felonies, (2) convicted of other crimes, or (3) identified through the Alien Smuggler Identification and Deportation Project.<sup>6</sup>
- The second group includes excludable aliens who (1) have a criminal or terrorist history; (2) attempt to enter with fraudulent documents or without documents; and (3) are otherwise inadmissible (e.g., seeking to enter to obtain unauthorized work).
- The third group includes aliens who have committed fraud against INS (e.g., entered with fraudulent visas).
- The fourth group includes aliens who have failed to appear for their hearings or have been ordered deported.
- The fifth group includes aliens apprehended as they tried to enter the country illegally.
- The sixth group includes aliens who have violated the law or INS regulations (e.g., worked in the country without authorization).

Under the priority system, district directors (and chief Border Patrol agents) are allowed to exercise discretion in custody determinations. The INS central office has directed the field offices to detain criminal aliens while continuing to detain a percentage of aliens within each priority within available detention space and resources.

The act requires detention, pending final determination of deportability, for aliens who are not lawful permanent residents<sup>7</sup> and are convicted of aggravated felonies (e.g., murder or drug or firearm trafficking). Aliens attempting to enter the United States without proper documentation who are apprehended at the border or a port of entry are considered excludable and are subject to mandatory indefinite detention unless eligible for parole. In addition, aliens under the age of 18 (unaccompanied minors) are to be held in detention until they can be released to a parent, legal guardian, or adult relative who is not presently in INS detention or, if necessary, an adult designated by the parent or legal guardian. With regard to all other aliens, INS is authorized to detain those who pose a danger to

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<sup>6</sup>The project is designed to target and prosecute alien smugglers.

<sup>7</sup>A lawful permanent resident is a noncitizen who resides legally in the United States and who may, after 5 years' residence, apply for citizenship.

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public safety or national security, or when INS has reason to believe that the aliens are not likely to appear at their hearings.<sup>8</sup>

According to INS, its detention efforts are crucial to immigration law enforcement for the reasons noted in its 1990 Detention and Deportation Plan.

“The ability to detain an alien, when an alien’s freedom at large clearly represents a present danger to public safety, is paramount if the Immigration and Nationality laws of this country are to be enforced. Clearly, if the capability to detain is not available, any deterrent effect upon illegal immigration is lost and enforcement efforts become no more than an exercise for training personnel.”

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## Increased Demand for Detention

Even though the number of aliens apprehended by INS has remained at about 1 million per year, the type of alien being apprehended has changed. Increasingly, INS is apprehending more aliens from countries other than Mexico and more aliens with serious criminal records. Both of these types of aliens usually have longer average lengths of stay in detention facilities than aliens who are from Mexico or are noncriminals.

Although Mexican nationals historically have been and are still the largest group of people entering the United States illegally, recent upheavals in Central America and other parts of the Third World have contributed to the increasing numbers of people from these countries seeking illegal entrance. These nationals cannot be returned as easily to their native lands as Mexicans, because—unlike Mexicans—they need travel documents (e.g., airline tickets and visas) before their country will permit them to be returned. Therefore, INS is forced to detain them for longer periods of time.

INS’ emphasis on apprehension and detention of aliens convicted of felonies and other serious crimes has also contributed to the increase in the average length of stay. These criminal aliens normally remain in INS custody for much longer periods of time than illegal entrants. Deporting

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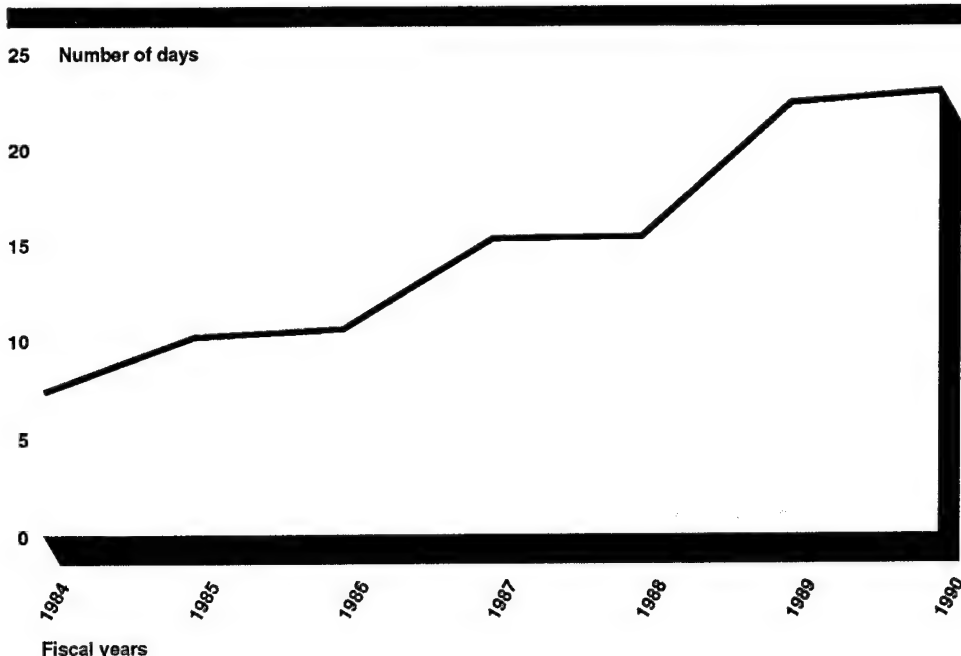
<sup>8</sup>The Supreme Court in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), approved the indefinite detention of excludable aliens. By contrast, the Immigration and Nationality Act explicitly limits INS’ authority to detain deportable aliens pending execution of their deportation orders. If the alien is not deported within 6 months, the alien must be released and put under supervision until deportation.



any alien can be a lengthy process due to the numerous rights of appeal available.<sup>9</sup>

Figure 1.1 shows that the average length of stay of detainees has increased from 7.3 days in fiscal year 1984 to 22.9 days in fiscal year 1990. Because average stays are longer, fewer apprehended aliens can be detained in the available bedspace. In fact, the proportion of aliens detained to those apprehended has decreased from 24 percent in 1982 to 9 percent in 1990.

Figure 1.1: Average Length of Detention



Source: INS Six Year Detention Plan.

The deportation process for criminal aliens usually begins upon conviction and sentencing for a deportable crime. Working with law enforcement agencies, INS identifies criminal aliens within federal, state, and local criminal justice systems such as courts or prisons. Investigators compile the evidence needed to deport aliens and issue (1) detainers, which notify the law enforcement agency to turn aliens over to INS when they are

<sup>9</sup>See *Immigration Control: Deporting and Excluding Aliens From the United States* (GAO/GGD-90-18, Oct. 26, 1989) for more information regarding aliens' appeal rights and their effects on the length of time for the deportation process.

released from custody and (2) orders to show cause, which inform aliens that they must appear for deportation hearings and show cause why their deportation should not proceed. INS can apprehend criminal aliens when they are released and either place them in detention or release them on bond.<sup>10</sup>

The Anti-Drug Abuse Act of 1986 (1) authorizes state and local law enforcement officials to notify INS when they arrest individuals on drug charges whom they suspect of being in the country illegally and (2) requests INS to determine promptly whether or not to detain them. The 1988 Anti-Drug Abuse Act requires INS to detain and deport aliens convicted of aggravated felonies.<sup>11</sup>

The 1988 act has significantly increased the number of criminal aliens detained by INS. Although INS did not have complete data on the number of criminal aliens apprehended, the number of criminal aliens whom INS arrested in urban areas increased from 12,500 to 30,500 between fiscal years 1986 and 1989. INS projects that it will need to detain almost 60,000 criminal aliens annually starting in fiscal year 1991. In comparison, the Bureau of Prisons housed about 60,000 inmates, as of August 1991.

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## Aliens' Rights

The Immigration and Nationality Act sets out procedural requirements governing deportation hearings. The act provides the following procedural rights in deportation cases:

- The aliens will be given notice, reasonable under all the circumstances, of the nature of the charges against them and of the time and place at which the proceeding will be held.
- The aliens will have the privilege of being represented (at no expense to the government) by such counsel, authorized to practice in such proceedings, as they shall choose.
- The aliens will have a reasonable opportunity to examine the evidence against them, to present evidence in their own behalf, and to cross-examine witnesses presented by the government.
- No decision of deportability will be valid unless it is based upon reasonable, substantial, and probative evidence.

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<sup>10</sup>The Immigration and Nationality Act precludes INS from removing criminal aliens from the country until they have completed their prison terms.

<sup>11</sup>The Immigration Act of 1990 permits INS to release certain aggravated felons (e.g., lawful permanent residents).

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To help aliens obtain representation, INS and EOIR provide aliens with lists of organizations and individuals who may assist aliens without charge or at reduced rates. The aliens' right to examine and present evidence—the opportunity to express themselves—includes the use of an interpreter when they request one or when the judge determines one is necessary.<sup>12</sup>

Although the act states the rights of aliens during their deportation hearings, failure to afford these rights during the hearings may not affect the final resolution of the aliens' cases. Courts have held that in order to overturn an immigration judge's decision because of a procedural error, the error must have affected the outcome of the alien's case.

At a deportation hearing, an INS trial attorney presents the INS case before an immigration judge. Once INS' allegations of deportability are established, the hearing procedures provide that aliens may seek relief from deportation. Aliens may use numerous grounds in contesting deportation (e.g., claim that they are U.S. citizens) or seeking relief from deportation (e.g., apply for political asylum). In certain instances, aliens are not eligible for relief (e.g., aliens who entered the country illegally and were charged with crimes of moral turpitude). Aliens may appeal adverse rulings through the Department of Justice to the federal courts up to the Supreme Court.

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## Objectives, Scope, and Methodology

The Chairman, Subcommittee on International Law, Immigration, and Refugees, House Committee on the Judiciary, pointed out that beginning with the long-term incarceration of Haitian asylum seekers in Florida in 1981 and continuing with the incarceration of Central American asylum seekers in South Texas in 1989, INS' detention policies and practices have become extremely controversial. Immigrant advocacy groups have denounced these policies and practices as violating civil and human rights, arbitrary and capricious, and even discriminatory. Accordingly, the Chairman requested that we review INS detention policies and practices to determine the basis on which INS detains aliens. Specifically, we agreed to analyze INS detention policy implementation at the field level. This included reviewing

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<sup>12</sup>In *El Rescate Legal Services*, the court is considering the question of whether immigration proceedings for non- and limited-English-speaking individuals must be interpreted in full. *El Rescate Legal Services v. EOIR*, 727 F. Supp. 557 (C.D. Cal. 1989), reversed and remanded, 941 F.2d 950 (9th Cir. 1991), amended on reh'g, \_ F.2d \_, No. 90-55292 (Mar. 10, 1992).

- INS' criteria and priorities governing alien detention and
- INS' delegation for detention to its district offices.

In addition, we agreed to

- determine the rights of detainees but not their ability to exercise their rights;
- compare statutory and administrative detention policies for distinct nationalities with the results of a case file review;
- determine if aliens who voluntarily present themselves to an INS officer in order to apply for asylum risk being detained;
- include data that INS used to show that detention is a deterrent to illegal immigration; and
- determine the number of aliens who had or did not have representation, compare the time those with and without representation spent in detention, and discuss the issues related to the government providing representation.

We visited 13 detention facilities that INS used and reviewed all available records for those aliens being detained at the time of our visit.<sup>13</sup> We also reviewed the apprehension records at 11 districts in which the detention facilities were located. Table 1.1 shows the locations we visited and the number of cases we reviewed. We spent about 1 week at each location from March 13 through June 7, 1991.

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<sup>13</sup>After our review, INS started using 14 facilities.

Table 1.1: Detention Facilities Visited  
and Number of Cases Reviewed

Facility	Location	Capacity on 2/1/91	Detained aliens	Cases reviewed
Varick Street	New York, NY	224	153	103
Krome	Miami, FL	451	424	404
Port Isabel	Los Fresnos, TX	668	581	449
El Paso	El Paso, TX	342	338	301
El Centro	El Centro, CA	344	307	271
Florence	Florence, AZ	325	320	299
Boston	Boston, MA	50	34	33
Houston	Houston, TX	150	215	182
Laredo	Laredo, TX	175	146	133
Denver	Denver, CO	150	135	124
Los Angeles	Inglewood, CA	200	252	209
Seattle	Seattle, WA	78	105	97
Wackenhut	New York, NY	100	105	100
<b>Totals</b>		<b>3,257</b>	<b>3,115</b>	<b>2,705</b>

Note: We were unable to review 410 files for the detained cases because the files were unavailable for our review because they were transferred to another location or were being used for deportation hearings. About one-third of the missing files were at the Port Isabel facility. We could not review 132 files in Port Isabel because heavy rains flooded the district office and many files were unavailable. At each of the locations, district officials assured us that our results would not be affected by these cases.

Source: GAO.

We cannot project our audit results to the universe of all detained aliens because we only reviewed the detention records for the population detained during our visit. We only sampled 1 month of apprehension records at the districts and cannot project the results to all apprehended aliens.

We reviewed INS detention procedures and policies and interviewed INS officials at the INS central office; 2 regions (Western and Southern) where we did most of our work; 11 districts (New York, Boston, Denver, Los Angeles, San Antonio, Harlingen, El Paso, Seattle, Phoenix, Houston, and Miami) where the detention facilities are located; and 2 Border Patrol sectors (El Paso and Miami). These units were judgmentally selected to determine (1) who decides to detain or release the aliens and the basis on which those decisions were made and (2) if these decisions are consistent with INS policies and procedures.

We reviewed files of aliens being detained at the seven INS and six contract detention facilities to determine the basis on which INS was detaining aliens and compared the results of the case file review with INS' detention criteria.<sup>14</sup> For the detained aliens, the case files provided basic information, such as their (1) nationality; (2) reason for detention; (3) date of detention; (4) transfer between facilities; (5) release date (if known); (6) resolution, if any, of their cases (e.g., ordered deported, deported, released); and (7) any factors affecting their detention or release.

For each apprehended alien, INS is to maintain a copy of the alien's apprehension record, which contains data such as biographical information, arrest record, and immigration status (e.g., entered illegally). We reviewed all apprehension records for a selected month at the locations we visited to determine which aliens INS apprehended but did not detain.

Generally, INS keeps the files of detained aliens at the facility where they are located. However, once the aliens are removed from the facility, their files are returned to the district office and kept with all other aliens' files. Therefore, no practical way existed for us to identify a universe of aliens who completed their detention. As a result, we could not determine the total time aliens spent in detention but rather determined the time they had already spent in their current detention facility when we reviewed the files.

INS maintains the Deportable Alien Control System, which contains such information as the alien's name, nationality, and date of apprehension. However, it does not contain certain additional information we needed, such as whether the alien was represented or applied for asylum. Further, in our September 1990 report, we said that data contained in the system did not accurately reflect the number of illegal aliens at its Port Isabel facility.<sup>15</sup> Accordingly, we did not use system data for this review.

In determining the rights of detainees, we interviewed INS officials and reviewed relevant laws, regulations, and guidelines and identified court cases affecting the detention and rights of aliens. However, we did not determine if detained aliens were able to exercise their rights or review the living conditions of detained aliens.

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<sup>14</sup>We did not include the El Centro contract facility because it held 11 aliens.

<sup>15</sup>Information Management: Immigration and Naturalization Service Lacks Ready Access to Essential Data (GAO/IMTEC-90-75, Sept. 27, 1990).



With respect to disparate treatment, we reviewed the Justice and INS policy regarding detention by nationality. In addition, we contacted immigrant advocacy groups and reviewed published studies concerning the disparate treatment of certain nationalities to identify different detention practices based on nationality. We also analyzed the results of the case file review.

To determine if aliens were at risk of being detained after presenting themselves to INS in order to apply for asylum, we compared their dates of detention to the dates they requested asylum.

In response to the Chairman's concern about the deterrent value of detention, we did not determine if it deterred illegal immigration. However, we agreed to review available data INS used to support its contention that detention can be a deterrent.

In response to the Chairman's concern about aliens having representation, including the government providing representation during the deportation process, we interviewed INS and advocacy group officials to determine if the use of government counsel might in some instances result in speedier deportation processes and fewer days in detention. In addition, we analyzed case file review data to compare length of detention for aliens at the time of our review who requested counsel, did not request it, and had representation. We also reviewed the list of free or low-cost legal services that EOIR and INS provide to detained aliens to determine (1) the accuracy of the lists and (2) the extent that the listed organizations provide direct assistance to aliens (i.e., represent them before EOIR or help them fill out forms).

We did our field work from August 1990 through July 1991. Our work was done in accordance with generally accepted government auditing standards. In commenting on our draft report, the Department of Justice generally agreed with our findings and recommendations and provided technical comments, which GAO incorporated where appropriate (see app. II).

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# INS Implementation of Detention Priorities Affects Aliens Differently

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INS has a flexible national detention policy and priority system. The system sets forth INS' detention policy in a priority order for major groupings of aliens. The highest priority is criminal aliens, followed by excludables.

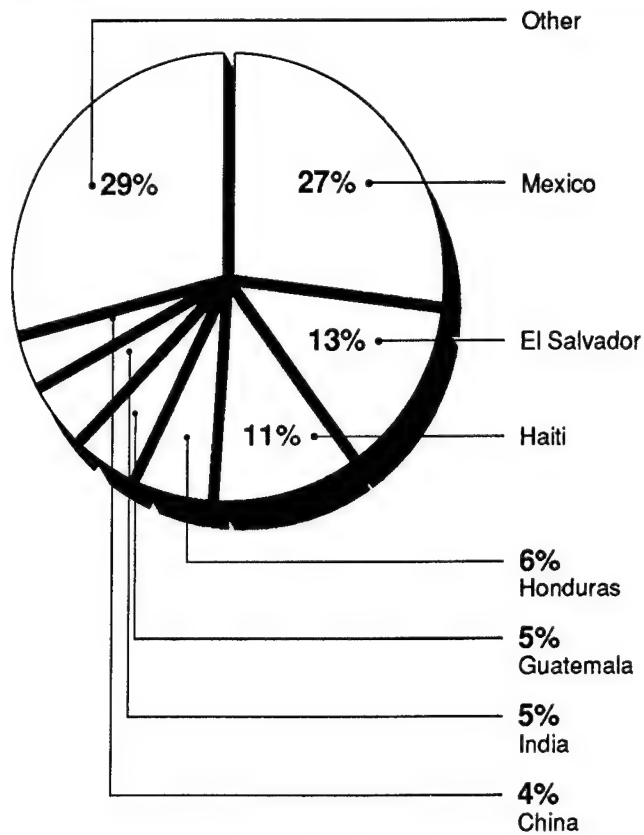
Our analysis of INS detention records indicated that INS generally followed its detention criteria. However, because of limited resources and specific legal and administrative requirements for certain nationalities, the likelihood of INS detaining an alien was related to (1) the location where INS apprehended the alien—the border or interior—and (2) the alien's nationality. These two factors also affected the length of time aliens were in detention.

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## Detained Aliens

We reviewed case files for 2,705 detained aliens at 13 detention facilities. Ninety-two nationalities were represented in our sample, but the predominant nationality was Mexican. Figure 2.1 shows detained aliens by their nationalities.

Figure 2.1: Site and Country of Origin  
for Detained Aliens



Note: The "Other" category includes 85 nationalities and 2 cases for which we could not determine the nationality.

Source: GAO analysis of INS data.

As shown in table 2.1, 4 of the 13 facilities housed predominately (70 percent or more) criminal aliens, while 4 other facilities had predominately noncriminal (e.g., excludable aliens). The remaining five facilities had a mix of criminal and noncriminal (deportable and excludable) aliens.

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**Table 2.1: Criminal, Excludable, and Deportable Aliens Detained in INS Detention Facilities**

Facility	Criminal		Excludable		Deportable		Total
	Number	Percent	Number	Percent	Number	Percent	
Boston	30	91	1	3	2	6	33
Varick Street	91	89	2	2	9	9	102
El Centro <sup>a</sup>	201	74	23	8	47	17	271
Florence	210	70	17	6	72	24	299
Houston	103	57	39	21	40	22	182
Laredo	72	54	5	4	56	42	133
Seattle	49	52	19	20	27	28	95
El Paso <sup>a</sup>	103	34	13	4	185	61	301
Denver	35	28	28	23	61	49	124
Los Angeles	7	3	192	92	10	5	209
Port Isabel <sup>a</sup>	11	2	5	1	433	96	449
Krome <sup>a</sup>	3	1	349	87	51	13	403
Wackenhut	0	0	100	100	0	0	100
<b>Total</b>	<b>915</b>	<b>34</b>	<b>793</b>	<b>29</b>	<b>993</b>	<b>37</b>	<b>2,701<sup>b</sup></b>

<sup>a</sup>Does not equal 100 percent because of rounding.

<sup>b</sup>The column does not total 2,705 because we could not determine the status of 4 aliens.

Source: GAO analysis of INS data.

According to INS, certain facilities are used for either criminal or noncriminal aliens, where possible, in order not to mix them. For example, INS' New York Wackenhut facility is used exclusively for detaining noncriminal aliens, while its Varick Street facility houses mainly criminal aliens.

Based on when the aliens entered the current facility to the date of our review, the average length of time criminal aliens had been in detention was 59 days; this length was about the same (56 days) for excludable aliens but longer than for noncriminal deportable aliens (47 days). Table 2.2 compares these statistics by facility. According to INS, the national average for length of detention for all detained aliens was about 23 days in 1990. As detention space becomes limited, INS releases aliens who are lower under its priority criteria in order to detain aliens who are higher (e.g., aggravated felons).

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**Table 2.2: Average Days in Detention by Facility**

Facility	Criminal		Deportable		Excludable		Overall average	
	Days	Number	Days	Number	Days	Number	Days	Number
Boston	111	29	26 <sup>a</sup>	2	27 <sup>a</sup>	1	103	32
Varick Street	152	91	112 <sup>a</sup>	9	335 <sup>a</sup>	2	154	102
El Centro	53	201	54	47	35	23	52	271
Florence	26	208	21	72	65	17	27	297
Houston	52	102	81	40	76	39	64	181
Laredo	56	72	40	56	38 <sup>a</sup>	5	48	133
Seattle	32	49	57	27	67	19	46	95
El Paso	49	103	35	185	54	13	40	301
Denver	58	35	48	61	89	28	60	124
Los Angeles	21 <sup>a</sup>	7	24 <sup>a</sup>	10	14	192	14	209
Port Isabel	176	11	50	433	53 <sup>a</sup>	5	53	449
Krome	97 <sup>a</sup>	3	64	51	85	349	83	403
Wackenhut	0	0	0	0	15	100	15	100
<b>Total</b>	<b>59</b>	<b>911</b>	<b>47</b>	<b>993</b>	<b>56</b>	<b>793</b>	<b>54</b>	<b>2,697<sup>b</sup></b>

Note: Length of detention was computed as the average length of time from when aliens entered their current facility to the date of our review.

<sup>a</sup>Averages may not be meaningful because of limited number of cases.

<sup>b</sup>Column does not total 2,705 because we could not determine either the number of days aliens spent in detention and/or their status.

Source: GAO analysis of INS data.

Further, the average time of those in detention at the time of our review fluctuated between nationalities (see table 2.3).

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**Table 2.3: Average Days of Detention by Nationality and Site**

Facility	Mexicans	El Salvadorans	Haitians	Hondurans	Indians	Guatemalans	Chinese
Boston	0	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>	0	0	<sup>a</sup>
Varick Street	0	<sup>a</sup>	264	<sup>a</sup>	0	0	<sup>a</sup>
El Centro	36	70	0	<sup>a</sup>	60	40	19
Florence	17	23	0	34	49	18	<sup>a</sup>
Houston	24	69	0	56	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>
Laredo	46	38	<sup>a</sup>	53	0	67	0
Seattle	16	92	0	<sup>a</sup>	49	<sup>a</sup>	<sup>a</sup>
El Paso	19	40	70	32	<sup>a</sup>	24	0
Denver	23	<sup>a</sup>	0	<sup>a</sup>	<sup>a</sup>	<sup>a</sup>	86
Los Angeles	29	21	0	0	13	4	16
Port Isabel	46	42	<sup>a</sup>	46	<sup>a</sup>	43	<sup>a</sup>
Krome	0	<sup>a</sup>	101	<sup>a</sup>	69	0	<sup>a</sup>
Wackenhut	0	<sup>a</sup>	<sup>a</sup>	0	13	0	11

Note: Length of detention was computed as the average length of time from when aliens entered their current facility to the date of our review.

<sup>a</sup>Averages are not included for those nationalities that had between one and four detainees in a facility because they would not be meaningful.

Source: GAO analysis of INS data.

Our analysis of alien detention cases showed that the average time they had spent in detention fluctuated by nationality and facility. For example, noncriminal Indians in Wackenhut had spent an average of 13 days as compared to 69 days in Krome, even though both facilities detained almost exclusively noncriminal aliens. Noncriminal Haitians had spent an average of 101 days in the Krome facility as compared to 69 days for Indians. See appendix I for more detailed information on the time aliens had spent in detention by nationality and facility.

## Detention of Excludable Aliens

For exclusion cases, in general, the location where an alien was detained determined the length of detention. Further, the point in time that INS apprehended aliens—as they tried to enter the country or after they entered—determined, to some degree, if they would be detained.

## Resources Determine Length of Detention

INS officials stated that funding and the relative demands on space were the primary factors that determined the length of detention at any given



facility. INS' national detention criteria require the detention first of criminal aliens, then excludable aliens. However, INS district officials said that space availability affected the length of time individuals spent in detention. At the time of our review, the average time the 793 aliens in exclusion had spent in detention was 56 days—ranging from 14 days for the Los Angeles contract facility to 335 days for Varick Street (see table 2.2).

The apprehension and subsequent detention of individuals from the People's Republic of China illustrates the impact resources can have on the length of time aliens are detained. Between October and December 1990, INS experienced an increase of excludable Chinese who were entering the country through New York City. Because they were excludable, INS detained them. However, as detention space became limited in New York, it sent a number of the Chinese to its Denver facility for detention because space was available there. According to New York district officials, the selection of which Chinese to send to Denver was made on the basis that those transferred aliens would not have to return to New York for their cases. Chinese who remained in New York were generally paroled into the country within a couple of weeks because the limited space was needed to detain aliens who were more recently apprehended. Those who were sent to Denver were detained until their cases were resolved (e.g., they were granted asylum or the court determined that they were excludable).

A Denver district official stated that INS has experienced lawsuits, partly because of the disparity between the length of detention for aliens detained in other parts of the country and those detained in Denver. Seven Chinese apprehended in Anchorage, Alaska, and sent to Denver had been detained by INS for about 5 to 7 months. They initiated a lawsuit to gain their release, but the case was dismissed for three of the litigants after they had been granted asylum and released. According to an INS report, Denver had 14 similar lawsuits pending as of August 1991.

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## Detention for Excludables Differs From Deportables

From 1945 to 1980, INS policy was to detain excludable aliens whom it considered to be security risks or likely to not attend their hearings. Then it changed its policy and started to detain almost all excludable aliens. This change was in response to the massive influx of over 125,000 Cubans and 15,000 Haitians in 1980. The excludable aliens who are being detained are not given the same consideration as is given the majority of deportable

aliens—early release unless it is determined that they pose a danger to public safety or national security or are likely to abscond.

This policy follows an arbitrary classification—aliens attempting to enter without valid travel documents—and severely restricts the possibility of release for those excludable aliens. By contrast, once aliens enter the United States—even by avoiding inspection and illegally crossing the border or by misrepresenting their intentions upon arrival and remaining beyond the permitted stay—they are no longer excludable but instead deportable. Thus, if apprehended later, they are entitled to release as long as appropriate assurances are given that they will not abscond and do not pose a danger to the community. In deciding if an alien is or is not likely to abscond, INS considers such factors as whether the alien has family members in the area and whether the alien has a strong case to support remaining in the country.

The detention policy creates two classes of aliens—those who successfully managed to enter the country illegally and those who did not—and it gives each class different treatment. Those found in the interior are routinely released; those found at points of entry are routinely detained. In our view, aliens who have reached the interior in a less than forthright manner are not less likely to abscond or more deserving of release than those who are stopped at the border.

This policy also affects the use of INS' limited detention resources. In our review of 2,705 detained aliens, we identified 170 excludable aliens who had been in detention over 90 days, some up to almost 2 years. Using INS' average daily detention cost of \$40 per day, INS had incurred a cost of about \$612,000 to detain these 170 aliens for 90 days.

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## Detention of Selected Nationalities Was Affected by Statute or Administrative Policy

In addition to the place aliens were detained, their nationality affected the length of time they spent in detention. Consistent with its detention criteria, INS does not detain aliens who are unlikely to be deported or excluded because of temporary relief provided by statute or administrative policy. As a result, aliens who likely will not be deported or expelled from the United States are generally detained, if at all, for only a short period. Nationals from Cuba, El Salvador, Guatemala, Nicaragua, and the People's Republic of China who meet eligibility criteria are affected by temporary relief provisions.<sup>1</sup>

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<sup>1</sup>People from Kuwait, Lebanon, and Liberia are also affected by specific detention policy. However, they represent 12 detained cases of the 2,705 in our review.

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Cuban Adjustment Act of  
1966

The Cuban Adjustment Act of 1966, as amended (8 U.S.C. 1255 note), recognizes Cuban nationals as political refugees and allows them to apply for permanent residence 1 year after entry. The act authorizes the Attorney General to adjust the immigration status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States after January 1, 1959. After 1 year, the alien's status may be adjusted to lawful permanent resident.

According to Miami district officials, any Cubans arriving on rafts and apprehended within the Miami district are to be released quickly from detention because they cannot be deported, therefore spending money for their detention is unwise. As a result, the Miami district does not detain Cubans for extended periods of time. According to district officials, most Cubans are only detained a few days until their identities can be determined and background investigations are completed. Subsequent to the investigation, most Cubans are paroled to family members or sponsors from the Miami community. According to Miami district officials, Cubans are given priority for release on parole because (1) most have immediate family members (e.g., parent or child) who can petition for their release, (2) it is difficult to deport them,<sup>2</sup> and (3) the provisions of the Cuban Adjustment Act make it inexpedient to use large amounts of resources to detain them.

As shown in table 2.4, at the time of our review of detention cases in Krome in the Miami district, we identified 16 detainees from Cuba who had been in detention an average of 16 days. In contrast, the entire sample of 404 Krome detainees had been in detention an average of 83 days.<sup>3</sup>

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<sup>2</sup>As of December 1990, INS had in detention about 2,600 Cubans whom it would remove from the country if Cuba would permit their repatriation.

<sup>3</sup>As shown in table 2.1, all those detained were (noncriminal) excludable (87 percent) or (noncriminal) deportable aliens (13 percent), except for 3 of the 404 aliens. Those 3 aliens were criminals.

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**Table 2.4: Average Length of Detention  
 by Nationality for Aliens Detained at  
 Krome**

Country of nationality	Number of cases	Average days
Haiti	278	101
Cuba	16	16
India	13	69
Colombia	9	42
Poland	9	25
Other <sup>a</sup>	79	45
<b>Total population</b>	<b>404</b>	<b>83</b>

Note: Length of detention was computed as the average length of time from when aliens entered their current facility to the date of our review.

<sup>a</sup>The "Other" category includes 34 nationalities and 2 cases where the nationality could not be determined from the files.

Source: GAO analysis of INS data.

**Temporary Protected  
 Status**

Under the Immigration Act of 1990, the Attorney General is authorized to grant temporary protected status (TPS) to nationals from certain countries with social or political unrest.<sup>4</sup> An alien who qualifies for TPS may be granted a temporary stay of deportation and work authorization.<sup>5</sup> The act further provides that an alien granted TPS shall not be detained by the Attorney General on the basis of the alien's immigration status in the United States.

The 1990 act specifically designated El Salvadoran nationals residing in the United States since September 19, 1990, as eligible for TPS, effective for an 18-month period beginning January 1, 1991. INS estimated that between 120,000 and 150,000 El Salvadorans would apply for TPS by the registration deadline of October 31, 1991.

<sup>4</sup>The Attorney General may designate a country for TPS classification if he finds that (1) there is an ongoing armed conflict within the country that would pose a serious threat to the personal safety of nationals of that country if they were required to return; (2) there has been an earthquake, flood, drought, or other environmental disaster in the country resulting in substantial but temporary disruption in living conditions in the area affected; (3) the country is unable to handle the return of its nationals and has officially requested TPS designation; and (4) other exceptional circumstances make return to the country unsafe, and temporary asylum in the United States is not contrary to the national interest of the United States.

<sup>5</sup>A national of a designated country may be granted TPS if the alien (1) has been continuously physically present in the United States since the effective date of designation; (2) has been continuously residing in the United States since a date set by the Attorney General; (3) is admissible as an immigrant; and (4) has not been convicted of a felony or two or more misdemeanors in the United States. The Attorney General has to determine that the described person has not persecuted others, committed particular serious crimes or other serious nonpolitical crimes, or poses a danger to national security.

In our review of apprehension records, we found that 45 of 51 El Salvadoran nationals apprehended by INS were released and 6 were detained. Of the 45 aliens released, 37 were released because they were eligible for TPS benefits. We identified 365 detained El Salvadorans who, according to INS, did not qualify for TPS.

On March 27, 1991, the Attorney General also designated the nationals of Kuwait, Lebanon, and Liberia for TPS for 1 year. On September 6, 1991, the Attorney General included the nationals of Somalia for TPS for 1 year. The designation has been extended for Lebanese and Liberians but not for Kuwaitis.

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American Baptist  
Churches v. Thornburgh  
Settlement Affects  
El Salvadorans and  
Guatemalans

*The American Baptist Churches v. Thornburgh*, 760 F. Supp 796 (N.D. Cal. 1991), case was filed in May 1985 on behalf of over 80 religious and refugee assistance organizations that alleged that INS, EOIR, and the State Department engaged in a pattern and practice of discrimination against El Salvadoran and Guatemalan asylum seekers.

The settlement, approved on January 31, 1991, applies to El Salvadorans who were in the United States as of September 19, 1990, and Guatemalans who were in the United States as of October 1, 1990.<sup>6</sup> Under the settlement, those previously denied asylum by a district director, an immigration judge, or the Board of Immigration Appeals will have their asylum application reevaluated (de novo adjudication) by the newly trained corps of asylum officers hired under the regulations in effect on October 1, 1990. Further, INS may only detain class members eligible for relief who are otherwise subject to detention under the law and who (1) have been convicted of a crime involving moral turpitude for which the sentence exceeded 6 months or (2) pose a threat to national security or public safety. However, INS may detain, on the basis of events occurring after their application is denied, class members it believes are likely to abscond.

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Attorney General Directive  
Affects Nicaraguans

On July 2, 1987, the Attorney General directed that no Nicaraguan shall be deported who has a well-founded fear of persecution unless the Department of Justice finds that the individual has either engaged in serious criminal activity or poses a danger to the national security. He also directed INS to expedite applications for work authorization and to encourage Nicaraguans whose claims for asylum or withholding of

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<sup>6</sup>We identified 126 detained Guatemalans along with the 365 detained El Salvadorans who did not qualify for relief under the case according to INS.

deportation had been denied to reapply for reopening or rehearing of such claims in accordance with the Cardoza-Fonseca decision.<sup>7</sup> The Attorney General's directive was intended to ensure that individuals with a well-founded fear of persecution in Nicaragua were allowed to remain in the United States for the present and allowed to support themselves by working while they remained in the country.

In response to the Attorney General's concern, a special review unit—the Asylum Policy Review Unit—for deportations of Nicaraguans was established. This unit is not part of INS. INS' Office of General Counsel does an initial review of each case. If INS recommends deportation, the Asylum Policy Review Unit reviews the case and makes recommendations to the Deputy Attorney General who makes a final decision on the case.

As a result of the Attorney General's directive, INS generally does not detain Nicaraguans. However, when they are detained, they are subject to a longer average detention stay. Under the review process, INS averages 1 to 2 months to review the cases, and the unit averages 4 to 8 months, with many cases taking considerably longer. As a result, some Nicaraguans are subject to a longer stay in detention. In our review of detention cases, we identified 52 Nicaraguans being detained in 8 of 13 facilities we visited. While 7 facilities detained from 1 to 8 Nicaraguans, 21 were detained in Port Isabel. At the time of our review, the Nicaraguans in Port Isabel had been in detention for an average of 98 days. In contrast, all aliens in Port Isabel had been in detention an average of 53 days.

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## Presidential Executive Order Affects Chinese

On April 11, 1990, the president issued Executive Order 12711, directing the Attorney General to take any steps necessary to defer until January 1, 1994, the enforced departure of all nationals of the People's Republic of China and their dependents who were in the United States between June 4, 1989, and April 11, 1990. As a result, Chinese who qualify are generally not detained. The INS Commissioner stated that the president's order did not preclude district directors from detaining or denying parole to Chinese. However, he further stated that eligible deportable Chinese should not be detained and the parole of eligible excludable Chinese should be considered to be "in the public interest." If the district director determined that continued detention was appropriate, the decision was subject to

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<sup>7</sup>On March 9, 1987, the Supreme Court decided the asylum case of INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), changing the standard used to decide asylum cases. The Court concluded that the standard of evidence in use for the last 7 years, i.e., "a clear probability of persecution," had been too high and directed the Attorney General to establish and implement a lesser standard, i.e., "a well-founded fear of persecution."



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review by the central office. As of December 1990, about 50,000 Chinese had applied for benefits under the program. According to INS, the 104 detained Chinese in our sample were not eligible for relief under the order.<sup>8</sup>

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## **Conclusions**

On the basis of our analysis of INS' detention of 2,705 aliens, we believe that INS generally followed its priorities. About two-thirds of the aliens whom it detained were in its top two priority groupings—34 percent were criminal aliens and 29 percent were excludable aliens.

The time aliens spend in detention can be affected by the amount of available detention space, laws, and administrative policies. For example, INS tends not to detain Cubans as a result of its implementation of the Cuban Adjustment Act. These factors, for the most part, are not within INS control.

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<sup>8</sup>In our review, we identified 104 Chinese in detention who arrived after April 11, 1990, or had been convicted of a crime and therefore were not affected by the order.

# Policy Solutions Needed for INS to Meet Its Detention Demands

Our review of 2,705 detention cases indicated that INS generally followed its detention criteria. However, because of variations in availability of detention facilities from location to location, the duration of detention can depend in large part on where the aliens are detained. INS plans to expand its detention capability from 6,259 beds to about 8,600 by 1996 to help meet the need to detain increasing numbers of deportable and excludable aliens. Also, INS is taking certain actions designed to reduce the need for detention space. However, INS has little or no prospect of being able to detain the overwhelming number of aliens it apprehends who should be detained under its criteria.

The detention problems are part of the larger enforcement questions relating to aliens—preventing aliens from illegally entering the country and removing those who do not have a legal basis to remain. INS has limited resources to detain those aliens who try to illegally enter or remain. Further, the prospect for significant resource increases is unlikely. As a result, INS will continue to be limited in its ability to carry out its detention responsibilities.

## INS Plans Expansion of Detention Capacity

INS believes that its detention efforts are a deterrent to illegal entry. Accordingly, INS is expanding its detention capability in attempting to respond to the increased flow of aliens illegally entering the country as well as the increased number of criminal aliens.

## Detention as a Deterrent to Illegal Entry

Contending that detention is a deterrent to uncontrolled illegal immigration, INS referred to three efforts to reduce the flow of aliens entering illegally—(1) Central Americans entering the country through South Texas, (2) Haitians entering through Miami, and (3) Chinese entering through New York City.

### South Texas

In response to a dramatic increase in the illegal entry of Central Americans in South Texas (Rio Grande Valley), INS initiated steps, from December 1988 to June 1989, to restrict the flow. Many of these Central Americans were requesting asylum—requests that the then INS Commissioner considered to be “frivolous.” INS expanded its apprehension and detention efforts and instituted a 1-day expedited review of the asylum applications for persons who filed with the district director. The 1-day expedited process was limited to aliens who entered the United States illegally, avoided apprehension, and presented themselves at the INS Asylum Office. According to the INS Commissioner, the actions INS took in South Texas

were successful. He said that the average number of non-Mexican apprehensions declined in South Texas from 147 a day during the period from February 22 to March 15, 1989, to 72 a day for the period from March 16 to April 15, 1989.

## South Florida

In May 1981, prompted by the influx of Cubans and Haitians entering the country illegally, INS began routinely detaining excludable aliens in an effort to discourage such illegal immigration. In the 1970s, few Haitian migrants attempted to enter the country, but their number increased rapidly to 15,093 in 1980. As shown in table 3.1, monthly figures of excludable Haitian arrivals increased from 308 aliens in February 1980 to 2,280 in October 1980. However, the numbers of Haitian arrivals dropped to 306 in October 1981. INS Miami district officials attributed this drop in the number of excludable Haitian arrivals to its detention efforts. However, the most significant reduction—monthly arrivals of less than 50—occurred after the Coast Guard stationed a vessel off the coast of Haiti in October 1981 and interdicted those Haitians bound for the United States. This measure was taken with the consent of the Haitian Government.

**Table 3.1: Known Excludable Haitian Arrivals in Miami, Florida**

Month	1980	1981	1982
January	577	769	41
February	308	262	12
March	1,401	530	14
April	1,174	475	20
May	1,266	803	2
June	1,456	1,507	6
July	1,462	1,717	4
August	1,731	978	0
September	1,874	629	N/A
October	2,280	306	N/A
November	1,021	47	N/A
December	543	46	N/A

N/A = not available.

Source: INS.

As of January 1991, the Coast Guard had interdicted over 23,000 aliens, mostly Haitians. The Haitians, along with returning Mexicans, are the only

foreign nationals who the United States routinely interdicts and returns to their country.

#### **New York City**

In October 1990, INS' New York district began efforts to detain at all costs all excludable nationals from the People's Republic of China attempting to enter the United States with fraudulent documents. Before this time, many of the Chinese were released from detention, pending their exclusion hearing, because of lack of space. Fraud cases for Chinese fell dramatically from a high of 205 in November 1990 to 38 in March 1991. INS attributed this drop to its detention efforts. However, INS reported that subsequent to the New York district's aggressive detention policy, Chinese were being smuggled through other major ports of entry—Miami, San Francisco, and Los Angeles—and were no longer concentrated exclusively at the John F. Kennedy International Airport in New York City.

In addition, because of the district's lack of detention space, many Chinese were released within 2 weeks. According to INS, these aliens did not report for their exclusion hearings and disappeared into the community. According to an INS report dated May 1991, as the word spread of the 2-week detention, the downward trend of fraud cases for Chinese started climbing to 73 and 77 cases in April and May 1991, respectively. The report concluded that, to these aliens, 2 weeks in detention was a small price to pay for employment in the United States.

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#### **INS Plans to Increase Capacity**

INS plans to increase its detention bedspace from about 6,259 beds in fiscal year 1992 to about 8,600 beds in fiscal year 1996 in an attempt to respond to the growing demand for detention bedspace. According to INS, the additional resources are needed because, as discussed in chapter 1, of the growing emphasis on the detention and deportation of criminal aliens, increasing demands placed on bedspace by detention of aliens other than Mexicans, and increasing average length of alien detention (from 11 days in 1986 to 23 days in 1990). Given the 23-day average, INS can detain about 99,000 aliens a year with its present capacity.

In February 1991, INS estimated that over the next 6 years, it will apprehend 6.8 million aliens who are illegally in the United States. INS further estimated that it will detain 900,000 aliens for lengths of stay ranging from 1 day to several months. The others will be returned to their countries voluntarily or released.

Criminal aliens are placing—and are estimated to continue to place—a high demand on INS resources. In February 1991, INS estimated that in fiscal year 1991, over 66 percent of detainees will be criminal aliens. Further, INS projected that in the next 6 years the number of criminal aliens will continue to increase, as shown in table 3.2.

**Table 3.2: Projected Number of Criminal Aliens Detained and the Number of Beds Required to Hold Them**

Fiscal year	Number detained	Beds needed
1991	57,000	2,500
1992	73,200	3,500
1993	76,300	3,931
1994	79,000	4,141
1995	83,800	4,390
1996	88,800	4,654

Source: INS Six Year Detention Plan (fiscal years 1991-1996).

INS' estimates take into account its enforcement resources and apprehension statistics rather than the potential universe of deportable criminals in custody and expected to be apprehended by state and local authorities in the future. Therefore, more aliens may be subject to detention than INS estimates. For example, in 1989, we testified that over 72,000 aliens will be arrested yearly on felony drug charges who will be subject to deportation.<sup>1</sup> At that time, INS testified that according to Bureau of Justice statistics, as of June 30, 1988, about 20 percent of the total federal and state prison population (600,000)—about 120,000 prisoners—were deportable. Also, representatives from state and local agencies testified in November 1989 about the growing problem of illegal aliens committing crimes and overloading the court system, parole departments, and penal institutions.

## Detention Space and Other Programs Cannot Address Influx of Aliens

In addition to recent and planned facility expansion, the demand for detention space can be reduced by (1) expanding the institutional hearing program and (2) increasing the inspection at foreign airports of aliens flying into the country. However, these efforts will not significantly reduce the demand for detention space caused by aliens illegally entering and illegally remaining in the country.

<sup>1</sup>Criminal Aliens: INS Enforcement (GAO/T-GGD-90-6, Nov. 1, 1989).

## Institutional Hearing Program

Expansion of the institutional hearing program can reduce the demand criminal aliens place on detention space. As discussed in chapter 1, under this program, deportation hearings are to be conducted while aliens are incarcerated at penal institutions. If ordered to be deported, aliens are removed from the country when they complete their sentences. However, if their hearings have not been started or completed when they finish their sentences, INS would have to detain them until their deportation cases are resolved. In October 1990, INS reported that while the program is in place and operating well in many states, it is not operating at its full potential. Table 3.3 shows the results of a May 1990 INS survey of criminal aliens released from penal institutions to INS custody.

**Table 3.3: Criminal Aliens Released to INS Custody in May 1990 and Processed Through the Institutional Hearing Program**

Region	Criminal aliens	Processed	Percentage
Eastern	353	81	22.95
Northern	415	12	2.89
Western	3,495	89	2.55
Southern	1,569	37	2.36
<b>Total</b>	<b>5,832</b>	<b>219</b>	<b>3.76</b>

Source: INS May 1990 survey of criminal aliens released from penal institutions to INS custody.

In February 1991, INS reported that only about 6 percent of the criminal aliens complete their hearings before their release to INS custody. California, New York, Texas, and Florida exemplify this problem. These states have large criminal alien populations in their state penal systems. Each state reports a significant disparity between the number of criminal aliens in custody and the number of cases that EOIR is able to adjudicate.<sup>2</sup>

In California, for example, there were approximately 3,000 criminal aliens in state correctional facilities in 1991. Of these, approximately half were eligible for the program. Aliens with less than 6 months remaining on their prison terms were ineligible for the program.<sup>3</sup> The California Department of Corrections and INS agreed to use one facility for the program. Because of the limited bedspace at the facility, 16 cases a week were processed and 60 orders of deportation were issued a month, out of a possible 100 cases or more. EOIR was authorized 20 additional immigration judges for the program, but funding was not provided as of January 1992.

<sup>2</sup>According to EOIR, it had completed 88 percent of the cases that were referred to it.

<sup>3</sup>According to the Department of Justice, the 6-month period has been increased to 1 year and no upper limit exists.



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## Preflight Inspection

Expanding the preflight inspection program can help alleviate the exclusion problem. Some INS officials believe that INS should concentrate more on preventing unauthorized aliens from arriving in the United States. The program is currently in place at airports in Ireland, the Bahamas, Canada, and Bermuda. An INS New York district report, dated May 23, 1991, estimated that by expanding the preflight inspection program to Amsterdam, Brussels, Frankfurt, London, Paris, and Rome, INS would eliminate almost one-half of the inspections of foreign arrivals and approximately 25 percent of exclusion cases at John F. Kennedy International Airport. In such cases, aliens whom INS determines are not admissible to the country (excludable) would not be permitted to board the airplane. This measure would reduce the number of potentially excludable aliens from entering the country; had they tried to enter they would be subject to detention.

As also discussed in chapter 5, INS has released a number of exclusion cases that meet its detention criteria because of lack of space. For example, the Los Angeles district has nearly doubled its monthly exclusion cases from 745 in January 1990 to 1,363 in May 1991. Additionally, during the period November 10, 1990, through April 10, 1991, almost 4,000 excludable aliens were released from custody in Los Angeles. The conference report for the 1992 appropriations act directed that the negotiations process be initiated with the United Kingdom to include London in the preflight inspection program.

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## INS Cannot Meet Detention Needs

INS' apprehensions of aliens trying to enter the country illegally have soared over the past 3 decades. In fiscal year 1959, for example, about 45,000 aliens were apprehended. By the late 1970s through fiscal year 1990, INS averaged about 1 million alien apprehensions annually. In fiscal year 1986, apprehension of aliens peaked at nearly 1.8 million. The Border Patrol estimates that two successful entries are made for every alien who is apprehended. Compounding the problem of the large influx of aliens are INS resource constraints. Given those constraints INS has not been able to effectively carry out such responsibilities as apprehending aliens here illegally, detaining those aliens it apprehends, pursuing aliens who fail to appear for hearings or abscond after being ordered to depart, and ensuring their removal when ordered to depart.

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## Large Illegal Alien Population

The Census Bureau estimated the population of aliens here illegally in 1980 at 2.5 to 3.5 million. Census estimated a net addition of 200,000 immigrants per year entering illegally, some of whom enter illegally for

temporary periods. In addition to these potentially deportable aliens, an unknown number of lawful permanent resident aliens may become deportable because they have engaged in criminal, immoral, drug-related, or other prohibited activities. This number of potentially deportable aliens has been reduced by about 2.9 million aliens who applied for legal status under the Immigration and Control Act of 1986. Thus, an estimated 1.2 to 2.2 million potentially deportable aliens reside within the country.<sup>4</sup>

#### Limited Detention Space Results in Release of Criminal Aliens

Our analysis of apprehended aliens showed that INS did not detain all criminal aliens because of limited detention space. For example, from October 21 to December 15, 1990, districts and Border Patrol sectors in the Western Region released 382 convicted criminal aliens on their own recognizance because of limited detention space. Furthermore, from January through June 1991, the New York district released 77 criminal aliens and did not detain another 116 criminal aliens. During 1990, 201 criminal aliens were released in the Boston district. In addition, our review of INS apprehension records showed that 40 criminal aliens were not detained in the 11 districts we visited.

#### Removing Aliens Is Difficult

Compounding the problem of dealing with large numbers of aliens illegally residing in the country is the difficulty of removing them. In our October 1989 report, we pointed out that the existing process to deport aliens is not working well. Aliens violate our laws by entering the country illegally; not complying with the conditions of legal entry (e.g., overstaying their visas); or not attending their deportation hearings. Our report also showed that on the basis of our sample of deportation cases in New York and Los Angeles, about 27 percent of the aliens failed to appear at their deportation hearings.

The Immigration Act of 1990 implemented our 1989 report recommendations regarding aliens who fail to appear for their deportation hearings. If the aliens have been properly notified about their deportation hearings and they fail to appear, the act requires them to be ordered deported in absentia. However, INS has to locate, apprehend, and remove aliens from the country who have been so ordered. If INS finds these aliens, it may have to detain them in order to ensure their removal.

Detaining all aliens until their cases are resolved is too costly. For example, in fiscal year 1990, the cost per detention day averaged \$40

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<sup>4</sup>Added to the 1980 census of 2.5 to 3.5 million illegal aliens are 2 million aliens entering illegally from 1981 to 1990 (200,000 per year) for a total of 4.5 to 5.5 million. This estimate is reduced by 2.9 million aliens who applied for legalization under the Immigration Reform and Control Act of 1986 (or 1.2 to 2.2 million).

nationally. It ranged from \$12.42 for Port Isabel to \$100.33 for the Florence facility. Using INS estimates that (1) 297,000 aliens were awaiting deportation or exclusion hearings or awaiting deportation in 1990, (2) 120,000 aliens in federal and state prisons were subject to deportation in 1988, and (3) 72,000 aliens were subject to arrest on drug charges in 1989, we estimated that the cost to INS would be about \$450 million dollars to detain these aliens for an average of 23 days—the current average detention stay.

The overload on INS detention facilities is inextricably related to the ease with which aliens can enter the country illegally and to difficulties in more expeditiously expelling aliens who are deportable. Consequently, successfully addressing and resolving alien detention issues can be accomplished only in the context of finding solutions to the broader problems of border control and deportation policy. Border control initiatives raise complex issues of international relations, including

- the economic disparities between the United States and other nations, such as Mexico, which give rise to illegal immigration;
- conflicts between trade facilitation objectives calling for efficient flow of goods across the border and immigration control needs calling for added documentation and closer scrutiny of cross-border traffic;
- the reliance of U.S. employers on inexpensive labor, legal and illegal, from south of the border; and
- the reliance of the Mexican economy on money earned in the United States and spent in Mexico.

Other issues are raised as well, including

- the feasibility and effectiveness of different approaches to, and technologies for, improved border control;
- humanitarian concerns, such as equitable treatment of aliens of different nationalities and divided families; and
- cost considerations and trade-offs, such as choosing between alien detention and prevention of their illegal entry, in a time of budgetary constraint.

Proposals to more effectively expel deportable aliens also raise difficult issues, which have to take into account their rights to certain constitutionally based procedural protections.

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## Conclusion

INS is faced with a complex problem of coping with the hundreds of thousands of deportable and excludable aliens it apprehends. Detaining all such aliens is cost prohibitive and impracticable. Some of the aliens, however, have committed crimes. INS believes other aliens, if not detained, would not appear for their deportation or exclusion hearings. We estimated that about \$450 million in 1990 would be needed if the aliens who were awaiting hearings and criminal aliens were detained for 23 days—average detention in 1990.

Our analysis of 2,705 detention cases indicated that INS generally followed its detention criteria. However, INS apprehended but, because of lack of space, could not detain numerous criminal aliens—its highest priority under its detention criteria. INS also released criminal aliens from detention to make space for other criminal aliens of a higher priority.

In attempting to respond to the need for more detention space, INS plans to increase the number of beds from 6,259 to 8,600 by 1996. This increase, in our opinion, will not be sufficient to meet the increased need to detain criminal aliens.

INS sees detention as a deterrent to the flow of aliens illegally entering the country. It reported some success in temporarily reducing the flow of illegal entry in three specific situations. However, it does not have the resources (e.g., detention capability) to maintain such efforts or to detain those aliens whom it believes that it should. In our opinion, the institutional hearing program and preflight inspection program, along with INS' plans to expand its detention capabilities, cannot significantly offset its need to detain the increasing number of criminal aliens. For example, about 120,000 aliens in federal and state prisons were deportable aliens.

The detention problem is affected by the ability of the federal government to control our nation's borders and to remove those aliens who do not have a legal basis to remain here. A provision of the Immigration Act of 1990 made it easier to remove aliens by requiring that aliens not appearing for their deportation hearings be ordered deported in absentia. However, INS still has to find those aliens, detain them, and remove them from the country.

We do not believe that it is feasible to expand INS' detention capabilities sufficiently to solve the problems. While we agree that expanding the institutional hearing program and preflight inspection efforts can reduce the demand for detention, the impact will be slight. INS has little hope of

coping with its detention needs unless two related programs, the one to prevent aliens from illegally entering the country and the one to remove aliens with no legal basis to remain here, are made more effective. Despite the complexity of the issues raised by proposals to strengthen these programs and despite inevitable trade-offs between the objectives of tightening border and deportation programs on the one hand and broader trade and humanitarian objectives on the other, agreement on how best to address these issues is an essential prerequisite to making significant progress in resolving detention problems.

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**Matter for  
Consideration by  
Congress**

Congress may wish to address border security and deportation issues in the course of future deliberations on immigration policy, specifically: How secure do we want our borders to be? How aggressive should we be in expelling deportable aliens? How much additional funding are we willing to invest in these efforts?

# Issues Affecting Alien Representation

A related issue that may affect the length of time aliens spend in detention is their ability to obtain representation. While aliens are entitled to have representation at no cost to the government, our review showed that few aliens actually obtained such representation. This lack of representation could be attributed to the following: (1) aliens did not request representation, (2) facilities in remote areas made obtaining representation difficult, and (3) few legal aid organizations were willing to represent criminal aliens. As shown in chapter 2, criminal aliens made up 34 percent of the 2,705 cases in our review of detained aliens.<sup>1</sup> In addition, the legal aid lists that INS provides to detained aliens for their use in obtaining representation contained incorrect phone numbers and organizations that did not exist.

As shown by the low representation rate for aliens, they may have difficulty in exercising their right to obtain legal services. At the time of our review, our data showed that aliens with representation at various stages in the deportation hearing process had been detained longer than aliens without representation. However, the difference narrowed significantly for aliens appealing deportation decisions.

## Few Aliens Had Representation

On the basis of our analysis, at the time of our visit, 2,071 of 2,670 aliens (or about 78 percent) did not have representation.<sup>2</sup> However, 301 of those aliens (or about 11 percent) requested, but did not obtain, representation.

By having representation, aliens may have a better opportunity to become aware of their rights and options to remain in the country. In an earlier report, the Chief Immigration Judge advised us that when aliens were not represented, the immigration judge's statutory responsibility as a special inquiry officer had more significance.<sup>3</sup> We also noted in that earlier report that the immigration judges provided explanations to the aliens of their rights and of possible consequences under the law. For example, one alien, before his deportation hearing, chose not to be represented and did not contest his deportation. While the judge was explaining the deportation process to the alien, the judge noted that the alien might have been a legal resident. The judge suggested that the alien get representation because the alien might be eligible to obtain relief from deportation. The

<sup>1</sup>Criminal aliens are those who committed a crime for which they could be deported.

<sup>2</sup>We could not determine whether aliens obtained, requested but did not obtain, or did not request representation for 35 of the total 2,705 cases we reviewed.

<sup>3</sup>Criminal Aliens: Prison Deportation Hearings Include Opportunities to Contest Deportation (GAO/GGD-90-79, May 25, 1990).

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alien declined, and the hearing proceeded. We noted other cases in which the judges took steps to assist unrepresented aliens in understanding their rights.

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## Factors Contributing to Low Alien Representation

Although aliens have the right to representation at no expense to the government, only 599 (or 22 percent) of the 2,670 aliens in our review had representation.<sup>4</sup> INS officials and representatives of alien advocacy groups attributed this low rate of representation to a number of factors. INS officials stated that, in their opinion, most aliens do not want representation in order to avoid lengthy detention. Advocacy group officials said that the remoteness of a facility discouraged free or low-cost representatives from assisting detained aliens. In addition, our discussion with legal aid organizations indicated that few organizations that provide free or low-cost legal services will represent criminal aliens. We agree that each of these factors can affect, to some degree, the rate of representation.

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## Detention Facilities in Isolated Areas

Organizations that represent aliens told us that a factor causing aliens difficulty in obtaining representation is that few attorneys who provide free or low-cost services are willing or able to make the long commutes necessary to some of these facilities. We pointed out in a previous report that aliens' ability to obtain representation could be affected when they are detained away from population centers.<sup>5</sup> In 1990, the Chief Immigration Judge recognized this potential problem and said that, where practical, selecting central locations for deportation hearings may help aliens locate representatives.

The following facilities were cited by these organizations as isolated:

- Krome, located approximately 20 miles from Miami, Florida;
- Port Isabel, located approximately 28 miles from Harlingen, Texas, and approximately 18 miles from Brownsville, Texas;
- Florence, located 60 miles southeast of Phoenix, Arizona; and
- El Centro, located approximately 114 miles from San Diego, California.

According to INS officials, with the exception of the Florence Service Processing Center, the location of these facilities was determined years—if not decades—ago based on the illegal immigration patterns at

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<sup>4</sup>We could not determine whether aliens obtained, requested but did not obtain, or did not request representation for 35 of the total 2,705 cases we reviewed.

<sup>5</sup>See GAO/GGD-90-79 for a discussion on remoteness of facilities.



the time. INS selected the Florence facility—one of its newest service processing centers—in part because, as a prior Bureau of Prisons site, it provided modern detention facilities. Therefore, the surrounding community would have little opposition to it as a detention facility.<sup>6</sup>

As shown in table 4.1, we compared the representation rate among the facilities at the time of our review. With the exception of Krome, the isolated facilities were below the average rate of 24 percent per facility. The 4 isolated facilities accounted for 1,151 (or 56 percent) of the total 2,071 cases where representation was not obtained.

**Table 4.1: Representation Rate Among Facilities**

Facility	Cases with representation	Total cases	Percentage
<b>Isolated</b>			
El Centro	27	270	10
Florence	13	293	4
Krome	147	399	37
Port Isabel	68	444	15
<b>Subtotal</b>	<b>255</b>	<b>1,406</b>	<b>18</b>
<b>Other</b>			
Boston	19	33	58 <sup>a</sup>
Denver	31	118	26
El Paso	69	294	24
Houston	44	182	24
Laredo	40	133	30
Los Angeles	42	208	20
Seattle	28	96	29
Varick Street	40	100	40
Wackenhut	31	100	31
<b>Subtotal</b>	<b>344</b>	<b>1,264</b>	<b>27</b>
<b>Total</b>	<b>599</b>	<b>2,670</b>	<b>22</b>

Note: Cases were included in the analysis only if alien representation was known.

<sup>a</sup>Boston's percentage may not be meaningful because of the few cases involved.

Source: GAO analysis of INS data.

<sup>6</sup>The location of another recent detention facility in San Pedro, California, was selected because it was also the site of a preexisting INS facility and was located near a Bureau of Prisons facility; this location helped minimize construction costs and community objection to the facility, according to INS officials.

## Reluctance to Assist Criminal Aliens

As shown in table 4.2, our review of 67 organizations identified on legal service lists provided by INS indicated that relatively few organizations provide direct assistance to any aliens and even fewer will represent criminal aliens. Our review included lists collected from the service processing centers of El Centro, Florence, Krome, and Port Isabel and the contract facilities of Denver, Houston, and Laredo. We selected these facilities on the basis of location and alien population.

Table 4.2: Legal Aid Organizations  
That Will Represent Criminal Aliens

Facility	Number contacted	Total that assist aliens	Number that represent criminal aliens
El Centro	2	1	1
Florence	16	9	2
Krome	20	9	3
Port Isabel	11	5	3
Houston	6	6	1
Laredo	12	8	1
<b>Total</b>	<b>67</b>	<b>38</b>	<b>11</b>

Note: Denver is excluded because we could not contact the two organizations on its list.

Source: Interviews with advocacy group representatives.

Although most organizations will refer aliens to other organizations or private attorneys, of the 67 organizations contacted, 38 directly provided representation to aliens or assisted aliens in filling out forms.<sup>7</sup> Of those, 12 said they would represent criminal aliens.

Criminal aliens were less likely to obtain representation than noncriminal aliens. Of the 2,670 aliens for whom we could determine whether they obtained, requested, or did not have a representative, 1,065 (or 40 percent) were criminal aliens. Of the criminal aliens, 176 (or 17 percent) obtained representation, compared to 27 percent of the noncriminal aliens.

## Errors in Lists of Possible Representatives

As indicated in table 4.3, INS lists of representatives contained organizations that did not exist or had incorrect telephone numbers. Four lists included either nonexistent organizations or incorrect phone numbers. Further, we identified three organizations on the Krome Service

<sup>7</sup>There were a total of 80 organizations listed for the 7 facilities. Four of those were nonexistent, and another three were listed twice under different names. We could not reach 6 of the remaining 73 organizations by phone because no one answered after several attempts.

Processing Center's list that had stopped representing aliens about 2 years ago.

Table 4.3: Accuracy of Legal Aid Lists

Facility	Number of organizations	Number of existent organizations	Number of organizations with correct phone numbers
El Centro	2	2	2
Florence	16	16	16
Krome	26	24 <sup>a</sup>	14
Port Isabel	12	11	11
Denver	2	1	1
Houston	6	6	6
Laredo	16	16	15
<b>Total</b>	<b>80</b>	<b>76</b>	<b>65</b>

<sup>a</sup>Three of these organizations were listed twice under different names.

Source: Interviews with advocacy group representatives.

Our review of these legal aid lists showed problems similar to those we had previously identified.<sup>8</sup> In the earlier review, we found that four of the five lists were inaccurate.

## Impact of Representation

At the Chairman's request, we analyzed detention data to determine the impact of government-provided representation. The low representation rate of detained aliens raises the issue of whether the presence or absence of alien representation could affect the length of time aliens remain in detention. INS officials had varying views on the impact government-provided representation would have on detention. While some officials thought that representation would prolong detention, others believed that this would be minimal and provided an example of the Florence Service Processing Center, where an informational program could reduce both alien detention time and the deportation process. At the time of our review, our analysis of detention files showed aliens with representation stayed about 2.5 times longer in detention than did unrepresented aliens.

<sup>8</sup>See GAO/GGD-90-79 for a discussion of legal aid lists.

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## Different Views Regarding Government-provided Representation

INS officials had mixed views on whether the government should provide representation to detained aliens. The officials were concerned as to whether government-provided representation would expedite the deportation process. Those officials who felt that counsel would delay the process stated that attorneys would only prolong individual cases by pursuing all avenues of relief from deportation (e.g., asylum). Although two other INS officials recognized that such a situation was possible, they believed that it would be minimized if the attorneys provided aliens with a realistic assessment of their cases. An advocacy group attorney stressed that if the government provided counsel, such a position should be independent of INS in order to eliminate possible pressures from within INS to expedite all cases regardless of merit.

We do not know the consequences of aliens representing themselves. However, we earlier estimated that aliens who had applied for asylum had a 12-percent approval rate of their cases for those represented by attorneys as compared to 3.9 percent for those representing themselves.<sup>9</sup> In addition, none of the applicants represented by religious or social groups were approved. We do not know the specifics surrounding individual cases or the impact representation had (i.e., would unrepresented aliens have different results if they were represented). However, the difference suggested that representation could affect the disposition of their cases.

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## Florence Service Processing Center Project

At the Florence Processing Center, a local alien advocacy group—the Florence Immigration and Refugee Rights Project, Inc.<sup>10</sup>—established an alien orientation program. Its objective is to enable aliens to make informed decisions about their deportation hearings. To do so, the project's attorneys explain to aliens their rights on the day of their hearing. These rights include eligibility requirements for various forms of relief, such as asylum. After these discussions, those aliens who do not want to discuss their cases further proceed immediately with their deportation hearings. Most aliens fall in this category, according to the project supervisory attorney. The remainder may discuss their cases individually with participating attorneys; this can result in (1) proceeding with their deportation hearings without further legal advice or (2) requesting a continuance on their hearings from the immigration judge to obtain a representative—either from the project's attorneys or another advocacy group—or by hiring a private attorney.

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<sup>9</sup>Asylum: Approval Rates Selected Applicants (GAO/GGD-87-82FS, June 4, 1987).

<sup>10</sup>Formerly the Florence Asylum Project.

INS officials at the Florence Service Processing Center said that the project had successful results. Although estimates of total time saved as a result of the project were not available, INS officials stated that it saved a significant amount of time during deportation hearings because the process used at the center eliminated the need to have immigration judges describe the various types of relief available to each alien during the hearings. One INS official estimated that INS saved about 15 minutes per alien, with about 40 to 50 aliens scheduled for hearings a day. In addition, the project's attorneys ensured that the quicker cases went first and that the court allocated the appropriate amount of time to the other cases, thus increasing court efficiency. However, according to the project's supervisory attorney, the success of this program relies heavily on INS cooperation and the availability of resources that this and other advocacy groups can provide.

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**Aliens With Representation  
Spent More Time in  
Detention**

As shown in table 4.4, 594 aliens who had representation had spent an average of 95 days in detention compared to 38 days for 1,764 aliens who were not represented and 60 days for 300 aliens who requested but did not obtain representation. Our analysis also showed that during various stages of the deportation process, aliens who had representation spent more time in detention. However, for those aliens who appealed their cases, the difference in length of detention diminished for those with representation as compared to those without—196 days compared to 186 days. While we could not determine why aliens with representation are detained longer, people who represent aliens most likely are more knowledgeable of rights that are available to aliens (e.g., asylum) and therefore may pursue such rights. Further, aliens who have or desire representation may have more complex deportation cases that require more time.

Some INS officials suggested that most aliens want to expedite their deportation as much as possible to avoid lengthy detention. According to these officials, these aliens are typically Mexicans who entered without inspection and have few, if any, avenues of relief from deportation and therefore do not want representation.

**Table 4.4: Status of Case by Representation and Average Length of Detention**

Case status	Represented		Not represented		Not represented but requested	
	Cases	Avg. days	Cases	Avg. days	Cases	Avg. days
Awaiting hearing	116	57	924	16	54	39
In progress	305	70	335	51	203	47
Case appealed	97	196	79	186	25	158
Case closed	76	121	426	47	18	96
<b>Total</b>	<b>594</b>	<b>95</b>	<b>1,764</b>	<b>38</b>	<b>300</b>	<b>60</b>

Note: Length of detention was computed as the average length of time from when aliens entered their current facility to the date of our review. The table does not include 47 cases where representation, case status, or length of detention were unknown.

Source: GAO analysis of INS data.

## Conclusions

On the basis of our analysis, 22 percent of the aliens had representation, while 11 percent requested but did not obtain representation. We could not determine the specific reasons why they did not obtain it; however, a number of factors may contribute to this lack of representation. These factors include the isolation of certain facilities, limited number of organizations and individuals who are willing to provide free or low-cost legal services to criminal aliens, and problems with INS' lists of organizations and individuals who may represent aliens.

Aliens who had representation spent more time in detention than aliens who did not have representation. This finding is not unexpected, because aliens who have representation are trying to remain in the country. Since INS may not release them while their case is in process, they remain in detention longer than those not contesting their removal from the country.

Different opinions exist within INS as to whether aliens should be provided free legal representation or some form of legal assistance when initially detained. Some officials stated that providing legal aid would expedite the deportation process and thereby reduce detention time. They referred to the Florence Service Processing Center project, which provides information to detained aliens about their rights so that they can make more informed decisions about their cases. Other INS officials expressed concern that representation would prolong an alien's case and result in longer detention times.

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The 22-percent representation rate of detained aliens, along with the 11 percent who requested but did not obtain representation, raises the issue of whether aliens are able to exercise their right to obtain representation as well as to have adequate access to representation while detained in remote areas. Under the existing law, aliens are entitled to representation, but not an expense to the government.

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**Recommendation to  
the Attorney General**

Because of the low representation rate for detained aliens, we recommend that the Attorney General direct INS and EOIR to determine the reasons aliens are not exercising their right to obtain representation and take appropriate action on any problems identified.



# Excludable and Detained Aliens Requested Asylum

While not directly related to INS' detention policy and procedures, concern has been raised that aliens risk being detained when they apply to INS for asylum.<sup>1</sup> However, our analysis showed that this generally was not the case. In our sample of 2,705 detained aliens, 417 requested asylum. About one-fourth of the detained aliens were deportable and already in detention when they applied for asylum, and about 66 percent were excludable.

INS tested for an 18-month period a pilot program to parole certain asylum applicants into the country rather than detain them in an effort to reduce its demand for detention space. These asylum applicants had to meet certain criteria to be paroled under the pilot program.

## Data on When Detained Aliens Request Asylum

Asylum applicants under deportation or exclusion proceedings generally applied while in detention. District directors stated that with the exception of excludable aliens, their general policy is not to detain asylum applicants who voluntarily present themselves to INS. In addition, advocacy groups knew of no cases within the past 2 years of aliens INS detained who had voluntarily presented themselves to apply for asylum.<sup>2</sup> Our review of detention files of deportable aliens supported the idea that asylum applicants applied while in their current detention.

Of the 2,705 INS detained aliens, 417 applied for asylum. Of the 319 applicants for whom we could determine the date of their application, 81 aliens (or 25 percent) applied after INS placed them in detention and 211 (or 66 percent) applied for asylum when they tried to enter the country and were detained on the basis of INS' policy of detaining excludable aliens. The remaining 27 (or 9 percent) detained aliens had applied for asylum prior to their detention.

- Twenty had applied for asylum before they were detained and according to INS officials they either had (1) asylum granted years before but had subsequently violated conditions for remaining in the country (e.g., committed a crime) or (2) asylum denied during previous deportation proceedings;
- three were detained for reasons unrelated to their asylum application (e.g., they were criminal aliens);

<sup>1</sup>Aliens can apply for asylum after they have entered the country by presenting themselves to INS or while in detention. Once apprehended, aliens may request asylum during their deportation or exclusion hearings.

<sup>2</sup>These advocacy groups were the Refugee Assistance Council, Incorporated; Casa Del Proyecto Libertad; and Florence Immigrant and Refugee Rights Project, Inc.

- two were stowaways; and
- one was a juvenile held in custody until INS could locate a legal guardian to whom the alien could be released.

We could not determine the status of one alien.

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## Pilot Parole Program

In May 1990, INS implemented a pilot program to test the feasibility of paroling up to 200 asylum applicants who met certain criteria, such as not presenting a threat to public safety, having means of financial support, and having a legitimate address where the alien could be contacted. Asylum applicants were to establish a prima facie case with the district director before being released on parole. The program was limited to the district offices in Los Angeles, California; Miami, Florida; New York, New York; and San Francisco, California; it was to last 18 months. However, lack of detention space forced some districts to extend parole to aliens who might not have qualified under the pilot program's criteria.

Although INS designed the pilot program for careful control of parolees, the number of excludable aliens entering the country and limited detention space forced a number of districts, including New York and Los Angeles, to release more than the intended total of 200 excludable aliens. For example, the New York district reported that, effective mid-June 1991, it would no longer detain excludable aliens with fraudulent documents who are asylum applicants because of lack of detention space. The New York district released 183 exclusion cases in June 1991. In addition, the Assistant District Director in Los Angeles reported that his district released excludable aliens before a prima facie asylum case was established because of limited detention space and hearing time.

According to INS officials, the program ended on October 31, 1991, and a report on the program was sent to the Commissioner in February 1992. They added that as of April 6, 1992, INS was analyzing the program results to determine what action to take regarding the future use of parole for asylum applicants.

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## Conclusion

Our review of detained aliens who applied for asylum showed that they were detained because they were (1) excludable and therefore met INS detention criteria or (2) already in detention when applying. INS has implemented a pilot program to parole into the country aliens who are

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**Chapter 5**  
**Excludable and Detained Aliens Requested**  
**Asylum**

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seeking asylum. This program may help relieve the burden on detention space imposed by aliens with legitimate asylum claims.



# Length of Detention by Type of Alien and Site

Facility	Number of allens			
	0-30 days	31-60 days	61-90 days	Over 90 days
Boston				
Criminal	9	5	3	12
Noncriminal	2	1	0	0
Varick Street				
Criminal	22	15	10	44
Noncriminal	3	5	0	4
El Centro				
Criminal	111	29	27	34
Noncriminal	54	2	5	9
Florence				
Criminal	166	23	11	8
Noncriminal	68	10	6	5
Houston				
Criminal	58	23	6	15
Noncriminal	34	17	11	17
Laredo				
Criminal	38	11	8	15
Noncriminal	33	19	3	6
Seattle				
Criminal	42	3	0	4
Noncriminal	26	8	4	9
El Paso				
Criminal	60	15	8	20
Noncriminal	150	20	11	17
Denver				
Criminal	23	1	3	8
Noncriminal	51	7	9	22
Los Angeles				
Criminal	6	1	0	0
Noncriminal	176	22	3	1
Port Isabel				
Criminal	3	2	3	3
Noncriminal	197	114	73	54
Krome				
Criminal	1	0	1	1
Noncriminal	122	101	43	135

(continued)

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**Appendix I**  
**Length of Detention by Type of Alien and**  
**Site**

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Facility	Number of aliens			
	0-30 days	31-60 days	61-90 days	Over 90 days
Wackenhut				
Criminal	0	0	0	0
Noncriminal	97	0	0	3

Note: Length of detention was computed as the average length of time from when aliens entered their current facility to the date of our review. Noncriminal includes deportable and excludable aliens.

Source: GAO analysis of INS data.

# Comments From the Department of Justice



U. S. Department of Justice

Washington, D.C. 20530


MAY 22 1992

Mr. Richard L. Fogel  
Assistant Comptroller General  
General Government Division  
U.S. General Accounting Office  
Washington, D.C. 20548

Dear Mr. Fogel:

The Department appreciates the opportunity to provide comments on the General Accounting Office (GAO) draft report entitled, "Immigration Control: Immigration Policies Affect INS Detention Practices." The Department generally agrees with GAO's findings and recommendations as stated in its report, and has informally provided technical comments to GAO. We understand that GAO is incorporating our comments into the final report.

Sincerely,

  
Harry H. Flickinger  
Assistant Attorney General  
for Administration

See pp. 6 and 22.



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